No. 11964

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

FRANK L. CHRISTENSEN,

Appellant,

vs.

CHARLES LEE TROTTER and
JOHN S. RAYBURN,

Appellees.

Brief of Appellant

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II

STATEMENT OF JURISDICTIONAL FACTS

The two cases here consolidated on appeal arose by original suit in the District Court of the United States in and for the District of Arizona. The plaintiffs alleged that defendants were all residents and citizens of the State of Arizona (T/R Page 2) and that the plaintiff(s) was a resident and citizen of the State of California (T/R page 3). There was a further allegation that the amount in controversy exclusive of costs and interest was in excess of Three Thousand Dollars (T/R page 3).

In both cases jurisdiction is given the District Court by Title 28, Section 41, the suits being of a civil nature, the matter in controversy exceeding (exclusive of interests and costs) the sum of Three Thousand Dollars, and being between citizens of different states.

Jurisdiction of the Circuit Court of Appeals for the Ninth Circuit depends upon Judicial Code, Section 128 Amended, Title 28-Section 225, providing that the circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions of the District Courts.

III

STATEMENT OF THE CASE

The causes of action arose out of an accident which occurred in Kingman, Arizona, the 24th day of March, 1944. The plaintiffs were engineer and fireman respectively on a west bound Atchison, Topeka & Santa Fe Railway train. It is undisputed that a truck belonging to the appellant had come to a stop across the Atchison Topeka & Santa Fe Railroad tracks. The truck was driverless so far as could be ascertained. The train collided with the truck and plaintiffs contend that they were injured as a result of the collision. Each plaintiff secured a verdict at the hands of a jury.

The ultimate question involved on this appeal is the responsibility of the appellant for the unexplained "running away" of appellant's equipment. Involved in the ultimate question is the application of the res ipsa loquitur doctrine, which application was disputed by appellant on motion for directed verdict at the close of the plaintiffs' case and raised again on instructions given by the presiding Judge, and raised yet again by motion for judgment notwithstanding the verdict and motion for new trial.

During the trial appellant offered in evidence the record of suits instituted by the plaintiffs, appellees

herein, against the Atchison Topeka & Santa Fe Railroad Company for personal injuries received in the accident, allegedly due to the negligence of the Railroad Company. The records were offered as statements against interest and for impeachment purposes. The Court denied the admission of the records as evidence.

The Court instructed the jury at the request of the plaintiffs that the statutory provisions of the State of Arizona relating to the parking of automotive equipment on a highway and setting a standard of care were applicable to the fact situation. Appellant objected to the instruction on the ground that the undisputed evidence was that the trucking equipment was not parked upon a public highway of the State of Arizona and that the instruction misled the jury as to the care required.

It is for determination of these questions that appellant has perfected his appeal.

IV

SPECIFICATION OF ERRORS

1. The Court erred in rejecting evidence offered by the defendant, being defendant's Exhibit "A" and "D" for identification, which was offered to prove that the plaintiff in this (these) action had made inconsistent statements as to the cause of the accident and further offered for use in impeachment as to the proximate cause of the accident. (Trotter T/R 99-101 and Rayburn T/R 117). The evidence rejected (Defendant's A and D for Identification) consisted of complaints verified by the plaintiffs' attorney that the accident in question was solely caused by the negligence of the Atchison Topeka and Santa Fe Railroad Company, and should have been admitted in evidence to

impeach the testimony of the plaintiffs by inconsistent statements.

2. The Court erred in denying the defendant's motion for a directed verdict at the close of the plaintiffs' evidence (T/R page 121) for the reason that the evidence at the close of the plaintiffs' cases had failed to establish proof of any negligence of the defendant.

3. The Court erred in failing to direct a verdict in favor of the defendant at the close of the case (T/R page 187) for the reason that the uncontradicted testimony showed that there was no negligence on the part of the defendant.

4. The Court erred in denying defendant's motion for an instructed verdict at the close of all of the evidence (T/R page 187) for the reason that the uncontradicted testimony of the witness for plaintiff and defendant showed no negligence on the part of the defendant which was or could have been the cause of the movement of the unattended equipment.

5. The Court erred in instructing the jury as follows:

"I instruct you that the laws of Arizona, Section 66-118 A. C. A. 1939, provide: 'No person having control or charge of a motor vehicle shall allow it to stand on any highway unattended without first effectively setting the brakes thereon and stopping the motor, and when standing upon any grade without turning the front wheels to the curb or side of the driveway.'

"If you should find from the evidence in this case that C. E. Wilson, the driver of the truck involved in this accident failed to comply with the provisions of the section just read to you and that he left said truck attended, without first effectively setting the brakes thereon, or without turning the front wheels

to the curb or side of the roadway, you are instructed that such failure constitutes negligence as a matter of law'." (T/R page 189);

for the reason that the statutes of the State of Arizona quoted in the instructions are not applicable to the fact situation, and imposed a burden upon the defendant by law which was in excess of the burden imposed of ordinary care, and for the further reason that the instruction assumed facts which were not in evidence, and assumed facts directly contrary to the evidence.

6. The court erred in instructing the jury as follows:

"From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to over throw it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiffs. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that he did, in fact, exercise ordinary care and diligence, or that the accident occurred without being proximately caused by any failure of duty on his part.

"The instruction just given may appear to constitute an exception to the general rule, that the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on a special doctrine of the law which may be applied only under special circumstances, they being as follows:

"First: The fact that some certain instrumentality, by which injury to the plaintiffs was proximately caused, was in the possession and under the exclusive control of the defendant at the time

the cause of injury was set in motion, it appearing on the face of the event that the injury was caused by some act or omission incident to defendant's management.

"Second: The fact that the accident was one of such nature as does not happen in the ordinary course of things, if those who have control of the instrumentality may reasonably be expected to know and be able to explain the precise cause of the accident.

"When all these conditions are found to have existed, the inference of negligence to which they give birth will support a verdict for the plaintiffs in the absence of a showing by the defendant that offsets the inference." (T/R page 190-191);

on the ground and for the reason that the instruction constituted comment on the weight of the evidence and for the further reason that the court incorrectly and prejudically applied the rule of "res ipsa loquitur."

V

SUMMARY OF ARGUMENT

The argument herein is divided into three main heads: that is, first, the trial court's ruling on the evidence, second, the application of res ipsa loquitur, and third, the instructions given.

VI

ARGUMENT

Defendant's Exhibits "A" and "D" for Identification

The defendant's Exhibit "A" and "D" for identification are copies of complaints filed by the plaintiffs in their actions against the Santa Fe Railroad Com-

pany for injuries suffered in the accident involved in this case.

The complaints were drawn by an attorney for the plaintiffs and verified by the attorney. (Trotter, T/R 98-99-100 and Rayburn T/R 116-117). The complaints charged the Santa Fe Railroad Company with the specific acts of negligence and alleged that as a result of the negligence the collision occured and the injuries were suffered.

In *Quealy Land and Livestock Co. v. George,* 18 Pac. (2d) 253, (Wyo. 1933), the Wyoming Court said:

> "The pleading of a party in another action if it contains facts inconsistent with his position in the action on trial is competent evidence against him, and its admissability it not affected by the fact that the pleading was signed and verified by his attorney; and that is especially true where from the very nature of the facts they must have been furnished the attorney by the party. 22 C. J. 335, Sec. 376. Quoting from Johnson v. Russell, 144 Mass. 409, 11 N. E. 670, 671, 'Defendant's answer in the Campbell suit was competent evidence against him in this suit; and it makes no difference whether he had seen the answer or knew its contents.'
>
> "In Clarke v. Taylor, 269 Mass. 335, 168 N.E. 806, 807, the Court says: 'The pleading of formal allegations by an attorney may be presumed to have been made without special instructions from his client, but in statements setting out a specific cause of action or defense the attorney is presumably acting under special authorization of his client.''

Quealy Land & Livestock Co. v. George, Supra pages 255, 256.

In *Johnson v. Russell*, 144 Mass. 409, 11 N.E. 670, the Massachusetts Court declares the rule:

> "When it is a pleading by an attorney of formal allegations, which may be presumed to have been made without special instructions from his client, it is not competent. But particular and specific allegations of matters of action or defense which cannot be presumed to have been made under the general authority of the attorney, but are obviously from specific instructions of the party, are competent."
>
> Johnson v. Russell, Supra.

It is true that Mr. Trotter denies that he ever saw a copy of the pleading that had been filed (T/R 101), but it is also true that the plaintiff "gave them all he had" (T/R 101) about the accident.

The positions assumed by the plaintiffs in the two cases are incompatible and completely inconsistent. The allegation in the present case is that a truck owned by the defendant "was so carelessly and negligently parked by defendants on the roadway * * * that it was suddenly caused to run away driverless and to run * * * on to the said railroad tracks and to collide with the said locomotive engine." (T/R 4).

The plaintiffs, having adopted one theory of the case against one defendant, may be impeached by a later declaration against another defendant which in the case of the later defendant specifically urges separate grounds for action and by direct reference removes the onus of the accident from the defendant on trial.

It is ordinarily true that in the case of a "run away" automobile there may be a presumption that the defendant was negligent. Without now touching on the

"res ipsa loquitur" doctrine, we believe the analysis of the Arizona Supreme Court determinative as to this point. In *Phen v. All American Bus Lines,* 110 Pac. 2d 227 (Ariz. 1941) a passenger on a bus sustained injuries as a result of an accident. When the accident occured the plaintiff was asleep and knew nothing of its cause. The witnesses who were awake at the time testified that the collision was not the fault of the driver of the bus. The Supreme Court of Arizona says:

> "If, however, there are two concurring causes of the accident, one of which is under the control of a stranger, and there is no evidence it was any more likely that the injury was caused by the negligence of the defendant than by that of the stranger, the rules does not apply. Further, if the uncontradicted testimony of disinterested witnesses shows clearly that there was no negligence on the part of the defendant and that the accident was caused solely by the negligence of a third party, the case is one for the court and not for the jury.";

and further says:

> "We have held repeatedly that a jury may not, as a matter of law, disregard the uncontradicted testimony of disinterested witnesses in regard to a fact. Illinois Bankers' Life Ass'n v. Theodore, 44 Ariz. 160, 34 P 2d 424; Crozier v. Noriega, 27 Ariz. 409, 233 P. 1104; Otero v. Soto, 34 Ariz. 87, 267 P. 947. The five passengers on the bus and the eyewitness nearby all testified positively and unequivocally that the bus was proceeding with proper circumspection and observing the rules of the road, and that the accident was caused by the negligence of the driver of the other automobile. Their testimony was in no manner discredited nor contradicted. This, as a matter of law, overcame any inference or presumption which was permissible under the rule of res ipsa loquitur."

The defendant should have been permitted to show that the plaintiffs, in another action, had ascribed the injuries received by them to another cause. To hold otherwise is to permit multiple recovery for a single injury. The proffered evidence was competent for impeachment purposes.

Res Ipsa Loquitur

Referring again to the last cited case, *Phen v. All American Bus Lines,* Supra, its application to the instant case is apparent.

The direct evidence in the instant case negatives a theory of negligence on the part of the operator of the trucking equipment. The only evidence to support the claim of negligent parking is a possible presumption. If the presumption ever validly applied, it was overcome by direct evidence and the case should have been taken from the jury for failure to prove the negligence alleged.

Q. "Now, after you parked your truck what did you do with your truck?"

A. "First turned off the key, check to see if it was in gear, had three gearshifts, had three gearshifts on it, I pulled on the air brake lever, had to use that to stop with, and then I checked to see if it was in gear and then pulled on my emergency brake and I sat and waited for the other truck."

Q. "Was that all that you could do; did you do everything that you could do with the truck?"

A. That is right.

Q. "And that was the regular way of parking it?"

A. "That was the way I always parked my truck."

Q. "Well, you have seen other truck drivers, you know that business, don't you?"

A. "Sir?"

Q. "I say you know that business, the trucking business?"

A. "Yes, sir; I should."

Q. "Now, could that car have moved away from there of its own motion, your truck?"

A. "No, sir."

Q. "Could not?"

A. "Could not move without a push. It either have to be out of gear or the brakes off."

Q. "You did everything that could be done, did you not, to make sure that it stayed there?"

A. "I did, all but getting out and hunting a rock to block the wheel."

T/R 138, 139.

When definite and positive testimony is placed on the scale any presumptions disappear and the burden then shifts to the plaintiff to produce affirmative evidence of negligence.

Seiler v. Whiting
52 Ariz. 542, 84 Pac. 2d 452.

It may be noted that the only positive testimony as to the location of the truck was given by the only eye-witnesses, the truck drivers, who were not interested parties. Both testified that the truck was parked in the oil station or garage. (T/R 138 and T/R 163). The witness for the plaintiff, Sam Marbell, a highway patrolman who investigated the accident, assumed that the truck was parked near Peggy's Cafe, (marked "B"

on the blackboard diagram which is incorporated in the record on page 28 thereof.) (T/R 66-67). Marbell says:

"I didn't see the truck parked there, but my investigation told me that the truck was parked there." (T/R 73)

Marbell also says:

Q. "The only reason you say the car was not parked over here in the garage area is because it could not have gotten away on its own power?"

A. "No, sir."

Q. "Unless somebody interferred with it, somebody set it in motion?"

A. "That is right."

T/R 79.

Marbell offers the alternative which completely dispells the application of the res ipsa loquitur doctrine when Marbell says:

A. "With mechanical failure it could have done anything. I don't know whether the brakes were set or not."

Q. "But there would have to be mechanical failure before it could of its own motion?"

A. "Either that or negligence on the part of the driver in not setting the controls."

T/R page 79

Q. "But if it had been parked in this garage area it could not have gotten away at all unless somebody had caused it?"

A. "That is right."

T/R pages 79-80

The instruction based on Marbell's presumptions, call for presumption built on presumption, and com-

pletely disregard defendant's theory of the case that some independent intervening agency put in motion a force without negligence on the part of the defendant, and must have irresistibly led the jury to the conclusion that there could be, under the circumstances, liability without fault.

We submit that the doctrine of res ipsa loquitur does not apply in the present case upon the two grounds demonstrated by the plaintiffs own witnesses: first, that the truck could not have gotten away if parked where the only witnesses placed the truck, and second, that the alternative suggested by the plaintiffs' witness removed the case from the application of the doctrine.

In a case (not involving the res ipsa loquitur doctrine) the Supreme Court of Arizona says:

> "When the definite and positive testimony of Whiting is placed on the scale, as we have said any presumptions disappeared, and the burden then shifted to plaintiff to produce some affirmative evidence of negligence which could be weighed by the jury as against the testimony of Whiting.
>
> "In the case at bar the jury was not allowed to base a verdict on guess or surmise that negligence existed. An inference from physical facts to conflict with positive testimony sufficiently to raise a jury question must point definitely to a lack of care—the testimony in this case points conclusively in the other direction."

Barry v. Southern Pac. Co.
166 Pac. 2d 825, at page 830,

quoting Seiler v Whiting, supra.

The Instructions

The application of the res ipsa loquitur doctrine has already been discussed. If the contention of ap-

pellant as to the application is correct the giving of the instruction concerning res ipsa loquitur is undoubtedly prejudicial error.

However, for another reason appellant contends that the instruction as set out in the specification of error (T/R 190-191) is prejudicially erroneous. The first sentence of the instruction:

> "From the happening of the accident involved in this case, *as established by the evidence,* there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant." (T/R page 190);

removes from the jury the question of whether the rule of res ipsa loquitur should be applied and, commenting on the evidence and the weight of the evidence instructs the jury that the doctrine must be applied: that is, the court invaded the province of the jury in the question of application. The jury could but believe from the instruction that the Court had considered the evidence on both sides of the case, and that under the evidence the jury *must* return a verdict against the defendant unless the weight of the evidence over came a prima facie case established by the plaintiffs. As indicated, appellant believes that the instruction was erroneous. In this connection appellant desires to direct the court's attention to defendant's requested instruction number two (T/R 19-20) the giving of which was refused by the trial judge. While appellant has not assigned the refusal to give defendant's requested instruction number two as error, we believe that the giving of the instruction would have corrected in part the instruction given by the trial court.

Appellant contends that the instruction as given by the Court at the request of the plaintiffs concerning

the applicability of the statute laws of Arizona regarding parking of a motor vehicle is fatally erroneous. The instruction at its best interpretation assumes as a matter of fact and evidence that the motor vehicle here in question was parked upon the highway of the State of Arizona. All of the positive evidence at the trial was contrary to this assumption.

Dewey A. Pennington testifying said:

Q. "While you were there (shortly before the accident) did you observe any truck in the vicinity of Peggy's Cafe?"

A. "Yes, I saw a truck sitting there at the west corner of the building."

Q. "What kind of a truck was it; that is, could you tell?"

A. "I don't know what make it was; but it was about a ton and a half truck."

Q. "Did it have anything connected with it in the way—a semi-trailer, or could you see that?"

A. "No, I didn't see any trailer."

T/R page 48

and on cross-examination Pennington says:

A. "I don't know what truck it was. I just saw one setting there." (T/R page 50)

This was slightly before the accident.

Thomas W. Atkins, a conductor for the Santa Fe testified on direct examination:

Q. "Do you know a place known as Peggy's Cafe, which was lighted up?"

A. "Yes, I am acquainted with that place."

Q. "Did you see that place?"

A. "I saw the place but I didn't go anywhere near that far."

Q. "With respect to the vicinity of Peggy's Cafe, how did these tracks run from the railroad?"

A. "Well, they ran in a general direction of Peggy's Cafe from the point where I found them on the track there."

and on cross-examination said:

Q. "You followed the tracks of the truck back where it was supposed to have been parked, did you?"

A. "In the general direction, only a short distance from the track."

Q. "How far?"

A. "Oh, I expect 20 or 30 feet."

The sum total of the testimony of the two Santa Fe employees was that one of them had seen a truck parked near Peggy's Cafe before the accident, and that the other had followed tracks from the scene of the accident twenty or thirty feet in the general direction of the "supposed" parking place. The two witnesses did nothing to establish the location of the truck prior to the accident.

Sam Marbell investigated the accident for the Arizona Highway Patrol, although the Patrol had no jurisdiction. He testified:

Q. "Yes. At the time, the information that I gathered and the inspection that I made led me to believe that the truck had been parked in the vicinity—

Mr. Struckmeyer: Just a minute.

Mr. Morgan: Go right ahead.

A. "I was making an investigation in an official capacity, and I made it my business to try to find out the details. My investigation disclosed that the truck was parked in the vicinity of what is known — what was known then as Peggy's Cafe, which would have been across the U. S. Highway 66, approximately 150 yards northeast of the scene of the accident."

Q. "Did you ascertain in what way it was parked? By that I mean was it pointed westward on the road or eastward?"

A. It was parked in a jacknife position, the cab headed—the front of the truck head west.

Q. On the north side of the road?

A. On the north side of the road.

Q. Would that be partly on the right of way?

A. Yes, it would, off the pavement.

Q. Now, from that point *where you ascertained* the car had been parked, can you tell the jury what the grades are, the contour of the country?"

(T/R 66-67)

Certainly his testimony added nothing to the proof attempted by the plaintiffs. On cross-examination Marbell testified:

Q. "Can you draw a diagram?"

A. "I believe I can."

Q. "I wish you would draw a diagram where it was parked. First draw Peggy's Cafe and the highway, I suppose."

(Thereupon the witness draws a diagram on the blackboard)

Mr. Struckmeyer, Sr.: "Now this one here you have marked 'garage', mark that 'A', will you please, so we may be sure about that."

(The witness complies.)

Q. "And 'B' is Peggy's Cafe."

(The witness complies)

Q. "All right. Now, the truck was parked where? Draw a diagram where the truck was parked."

(The witness complies)

Q. "And it was parked which way, facing which way?"

A. "Facing west."

Q. "Facing west?"

A. "Headed west."

Q. "It pointed toward the west and that is an open area, an alleyway?"

A. "Yes, sir. It is not an alleyway. It is an open area, but private property."

Q. "Private property?"

A. "Yes, sir."

Q. "What is immediately west of the garage?"

A. "Service station."

Q. "Mark that, please."

A. "(Complying) This is the building and this is the surrounding area."

Q. "You are positive that the truck was parked where you have indicated there, you are positive of that?"

A. "I didn't see the truck parked there, but my

investigation told me that the truck was parked there."

(T/R 72-73)

On re-direct examination Mr. Marbell admitted that the reason he believed that the truck could not have been parked where the defendant's witnesses state positively it was parked because the truck could not have gotten away without an intervening agency if parked where the defendant's witnesses state that it was parked.

Q. "You were asked, Mr. Marbell, if this truck could have been parked down somewhere in this section and you said no, it could not have been. Will you explain why it could not have been parked there?"

A. "I could explain that."

Q. "Go right ahead."

A. "It had to do with the contour of the ground. The reason that it could not have been parked here—

Mr. Struckmeyer, Sr.: "Well—go ahead."

A. "To be parked here is because the highway from the center line slopes to the north and to the south, and in order to—and at this point it slopes from the north to the south, and in order for the truck to have moved from this position or anywhere in the vicinity of this accident, which has a level driveway, perfectly level, practically as perfect as they could get it, would have to be under power to get over the hump in here and drop down here, a ways here. It could not possibly have moved from this point to here unless it was under power and being driven over it."

(T/R 77-78)

and on re-cross examination Mr. Marbell reiterated his conclusion

Q. "The only reason you say the car was not parked over here in the garage area is because it could not have gotten away on its own power?"

A. "No, sir."

Q. "Unless somebody interferred with it, somebody set it in motion?"

A. "That is right."

Mr. Marbell admittedly knew nothing of the actual parking of the truck.

We believe that the foregoing quotations cover all of the evidence of the plaintiffs regarding the parking of the truck.

Conda Wilson, driver of the truck, was sworn in behalf of the defendant. On direct, he testified:

Q. "Now, where were you parked there with reference to that service station?

A. "Right in front of the gas pumps on the outside next to the highway, but there was a sign, there was in the distance between the highway and the pavement where you drive into the gas station. The reason I didn't drive in the inside, there was a little roof over the inside of the plant and I couldn't get in there with the semi, and I pulled over on the outside so the light will reflect down in my motor when I check my oil."

Q. "That is why you stopped there to check your oil?"

A. "Always check the oil and gas when you stop. That was the main reason."

Q. "Then referring to this map, Exhibit C, can you point out there without paying any attention to this line here or this mark down there,

without paying any attention to that, can you point out where you were parked?"

A. "Right there where the X is."

Q. "Show it to the jury."

A. "Right there where the X is. This is the roof over the front end of the service station out in the first part of the service station where you drive in under a pump. There was a gas pump right in here and I parked right next to it, to the outside gas pump."

(T/R pages 134-135)

This is positive testimony, unrebutted by the conclusions drawn by Mr. Marbell, placing the defendant's truck at a point marked W-1 according to the blackboard diagram on page 28 T/R. The testimony is repeated by Leonard J. Gore, driver of another truck.

Q. "Now, in the meantime when he came over to your truck, where was his truck parked?"

A. "He left it at the service station."

Q. "Right at the service station?"

A. "Right immediately in front of the gas pump."

(T/R page 164)

Mr. Gore's testimony placed the truck at the same point testified to by Conda Wilson, that is, W-1, T/R page 28.

To recapitulate: One of the plaintiffs' witnesses saw a truck near Peggy's Cafe. Another of the plaintiffs' witnesses followed the tracks of the truck involved in the accident for twenty or thirty feet and the final witness for the plaintiffs admitted that he had concluded that the truck was parked near Peggy's Cafe only because the truck could not have moved from the spot

near the service station without an intervening agency.

The instruction itself assumed as a matter of fact and as a matter of law that the truck was parked near Peggy's Cafe *on the highway.* The instruction advised the jury that any violation of the provisions of the statute was negligence as a matter of law (T/R 189). The instruction invaded the province of the jury, constituted comment on the evidence and the weight of the evidence by the trial judge, and established negligence as a matter of law. It is prejudicially erroneous.

It is well settled in the State and Federal courts that an instruction is improper which assumes the existence of a fact which under the evidence is an issue for the jury.

It is seen that the instruction complained of assumed a fact which was at the best controverted. Mr. Justice Field in *Knickerbocker Life Insurance Company of N. Y. v. Foley,* 15 Otto 350-355, 105 U. S. 350-355, stated the law as follows:

> "No instruction should be given which thus assumes, as a matter of fact, that which is not conceded or established by uncontradicted proof."

The rule is basic and we do not deem it necessary to cite further cases in support of our contention.

The instruction was erroneous in that it assumes a fact in controversy, and based on the assumption, instructed the jury that the defendant's employee was negligent as a matter of law.

CONCLUSION

Appellant submits that this case should be reversed upon any and all of the three principal grounds urged

by the appellant. Appellant submits also that the case should be remanded with instructions to enter judgment in favor of the defendant upon defendant's motion for judgment notwithstanding the verdict and motions for directed verdict.

Respectfully submitted,

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